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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1998

H.N. AND FRANCES C. BERGER FOUNDATION
Petitioner,
vs.
CITY OF ESCONDIDO, et al.,
Respondents.

Petition for Writ of Certiorari
to the
California Court of Appeal
4th Appellate District

BRIEF OF WESTERN MOBILEHOME PARKOWNERS' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Western Mobilehome Parkowners' Association (*"amicus"* or "WMA") is the leading trade association for California's mobilehome and manufactured housing industry. WMA is a nonprofit, tax-exempt organization organized under the laws of California.[1]

WMA's members include owners and operators of more than 1800 mobilehome and manufactured housing communities throughout California. For many young families and older citizens, affordable housing means manufactured housing. Rent controls, regulations of land use and constitutional protection of property rights are matters of great interest to WMA members.

Yee v. Escondido, 503 U.S. 519 (1992) *("Yee")* acknowledged that local controls of mobilehome space rents might take property by regulation without compensation, in violation of the Fifth Amendment. The Court declined to decide issues outside the scope of Mr. Yee's petition for *certiorari,* while "awaiting a case in which the [regulatory taking] issue was fully litigated. . . ." 503 U.S. at 521. *Berger Foundation* is that case.

The decision below effectively disregards this Court's decisions in *Yee, Nollan v. California Coastal Commission,* 483 U.S. 825 (1987) *("Nollan")* and *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) *("Lucas"),* by limiting those precedents to their facts. Rather than permit Berger Foundation to prove that Escondido's ordinance operates unconstitutionally — as *Yee* contemplated — the lower court reasoned that no taking occurs, so long as the court could imagine (without receiving any evidence) some benefit.

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[1] This brief is submitted with the written consent of all parties, filed with the Clerk of the Court. It was prepared exclusively by *amicus'* counsel at *amicus'* exclusive expense.

The Fifth Amendment requires more. Berger Foundation is entitled to prove that Escondido's ordinance serves no legitimate purpose, but merely enriches a fortunate few at the expense of a handful of property owners.

Berger Foundation's petition for *certiorari* presents important issues left undecided in *Yee*:

> Do regulations that enrich a small group, by granting them marketable rights to occupy another citizen's property, take property in violation of the Fifth and Fourteenth Amendments?
>
> What scrutiny should the courts give to claims that regulations take property? May lower courts presume that regulations advance some presumed legitimate purpose, or, under this Court's precedents, must they examine evidence to decide these factual issues?

Finally, the decision below illustrates the California courts' tendency to interpret this Court's precedents narrowly and restrictively. These are matters whose importance extends beyond Escondido, or manufactured housing.

STATEMENT OF THE CASE

Modern mobilehomes are not trailers. They are manufactured homes, built in sections, towed into place on a prepared space or "pad", assembled, connected to utilities and then fitted with awnings, porches and the like. Their size and comforts compare favorably with postwar tract homes. Mobilehome communities have long appealed to senior citizens, and as prices for conventional homes have risen, mobilehomes have become increasingly popular "starter" homes for young families. Typically, mobilehome residents own their homes, and rent the space from the owner of the mobilehome park, who provides private streets, recreational facilities, common areas and amenities.

California regulates mobilehome tenancies through a Mobilehome Residency Law (codified as § 798 *et seq.* of the California Civil Code). Owners may not terminate tenancies without cause (Cal. Civ. Code § 798.55), require removal of mobilehomes when tenancies end (Cal. Civ. Code § 798.73), or disapprove incoming residents, if they are creditworthy, and likely to abide by park rules (Cal. Civ. Code § 798.74). As a consequence, mobilehomes are usually sold in place when a resident wants to move. Residents sell their homes to new residents, subject only to the owner's approval of credit and references.

Escondido's ordinance (the "Escondido Ordinance"), enacted by the voters in 1988, reduced mobilehome space rents to 1986 levels. Property owners may apply to the City Council, sitting as a Mobilehome Park Rental Review Board, for rent increases in order to pay for capital improvements and certain cost increases. All other increases are misdemeanors. There is no provision for adjustment of rents when mobilehomes are sold in place.

The Escondido Ordinance, operating in conjunction with the Mobilehome Residency Law, assures residents permanent tenure and bargain rent, so long as they pay the rent and observe park rules. Incoming residents enjoy the same rights, so mobilehomes change hands at huge premiums — often, tens of thousands of dollars more than comparable homes in dealer inventories or unregulated mobilehome parks. *Amicus* believes that these premiums represent the value of a statutory leasehold — a permanent, transferable, possessory interest in the owner's property — created by operation of law and given to the tenants without just compensation, in violation of the Fifth Amendment.

Berger Foundation alleged, in a complaint modeled upon *Yee,* that interests in its property had been taken by regulation, in violation of the Fifth Amendment. The California Court of Appeal acknowledged that since Mr. Justice

Holmes' seminal opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), the courts have recognized that regulations which go too far may effect a taking. "The inquiry as to when a regulation has gone too far is necessarily one of fact." (Appendix A-7). Nonetheless, the lower court upheld a nonsuit, denying Berger Foundation any opportunity to prove that Escondido's Ordinance operates as alleged and appropriates property without compensation, in violation of the Fifth Amendment.

The lower court reached this conclusion by relying upon California precedents to limit the "heightened scrutiny" contemplated by *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) *("Dolan")* to "out-and-out [plans] of extortion" (such as *Nollan*) or deprivations of "all economically viable use" (such as *Lucas*). Under California's restrictive interpretation of those precedents, all other situations, such as this challenge to Escondido's Ordinance, "need not be subject to a heightened *Dolan*-style level of scrutiny." (Appendix A-15). In essence, California has limited *Nollan* and *Dolan* to their facts.

In this way, judicial conjecture about the presumed benefits of lower rents makes unnecessary any evidence of the law's actual effect. Berger Foundation offered evidence that no one in Escondido actually pays the controlled rents. Those in residence at the time of enactment pay far less, as resale premiums offset rent. Their successors pay far more, since they must pay both monthly rent and the large resale premiums. Thus, the ordinance does not achieve its ostensible purpose of controlling rents, but enriches a favored group of voters at the expense of a few property owners. This is the very evil the Takings Clause was meant to prevent. "One of the principal purposes of the Takings Clause is 'to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by

the public as a whole.' " *Dolan,* 512 U.S. at 384, quoting, *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The lower court reasoned that even if Berger Foundation could prove a one-time wealth transfer, without any public benefit, there would be no taking so long as the owner received a return "sufficient to ameliorate the effects of [the] premium." (Appendix A-19). Fair return was not an issue below, because of pretrial stipulations, and no precedent exists for the astonishing principle — implicit in the lower court's reasoning — that owners of income property are entitled to no compensation if interests in their property are taken, so long as their properties earn adequate returns.

In fact, whenever property is taken, compensation must be paid. This Court has "frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 (1987).

SUMMARY OF ARGUMENT

Berger Foundation alleges, and offered evidence to prove, that Escondido's Ordinance appropriates interests in its property, and transfers those interests to residents. When mobilehomes are sold in place, residents receive the value of the interests taken as large resale premiums — nominally paid for the mobilehome coach, but representing the value of the right to occupy the owner's land at bargain rates. The Escondido Ordinance thus enriches fortunate residents in place at the time of enactment, at the owner's expense, without any benefit to future residents who must pay the resale premiums.

These facts, if proved, constitute violations of the Takings Clause of the Fifth Amendment, since interests in property are taken from owners and given to residents, without

compensation, and without benefitting anyone but those fortunate residents who were in place when Escondido's initiative passed. *Amicus* respectfully suggests that there could be no clearer example of a regulation that — far from substantially advancing a legitimate purpose — merely rewards one group of voters at the expense of a few property owners.

This Court has twice ruled, in *Nollan* and *Dolan*, that regulatory taking claims like Berger Foundation's deserve greater scrutiny than a cursory determination that they have some rational basis. The Takings Clause is not a mere pleading requirement, but "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment" and cannot be "relegated to the status of a poor relation. . . ." *Dolan,* 512 U.S. at 392. Here, lower courts following restrictive California interpretations of *Nollan* and *Dolan* surmised some benefit to residents, and based on that surmise, declined even to consider Berger Foundation's evidence. Judicial scrutiny requires more than conjecture and surmise.

ARGUMENT

I.

ESCONDIDO'S ORDINANCE DOES NOT SUBSTANTIALLY ADVANCE A LEGITIMATE GOVERNMENTAL INTEREST, AND, THUS, CONSTITUTES A TAKING.

Statutes take property if they do not *substantially* advance legitimate state interests. *Nollan,* 483 U.S. at 835, fn. 3. *Nollan* held that California's imposition of an easement upon the Nollans' property had little connection with the justifications advanced for the exaction. Without an adequate nexus between ends and means, the Court reasoned, the purpose became "quite simply, the obtaining of an easement . . . but without payment of compensation." 483

U.S. at 838. This Court also stressed that the nexus requirement is more stringent than its counterpart under the Equal Protection Clause. *Id.* at 834-35 fn. 3. More is required, the Court held, than a plausible reason:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. . . . [O]ur cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest.

Id. at 841 (emphasis in original). Measured by these standards, Escondido's Ordinance cannot pass constitutional muster.

The Escondido Ordinance contains no recitals or findings, so its purposes are obscure. The lower courts presumed that the ordinance was intended to benefit Berger Foundation's residents, "especially those living on fixed incomes" (Appendix A-19) but the Escondido Ordinance does not, and cannot, achieve these purposes.

Controlling rents is the supposed purpose. *But no one actually pays the controlled rent.* Some pay far more; a lucky few pay far less. Tenants in residence when the ordinance was enacted pay far less. Later residents pay far more. Tenants in place in June 1988 pay controlled rent until departure, when they receive the value of future rent savings in the form of resale premiums on their mobilehome coaches. The premiums offset rent payments during occupancy, so overall, original residents pay far less than the controlled rents.

By contrast, incoming tenants do not pay controlled rents, and receive no benefit from controlled rents, since they must pay large premiums, equal to the capitalized value of the difference between controlled rents and market rents. New

residents pay the equivalent of market rent, but pay the difference between market rent and controlled rent to the former tenant, in advance, rather than to the owner of the property. No legitimate purpose is served by such an irrational scheme. The only goal accomplished is a one-time wealth transfer from property owners to tenants in residence at the time of the election in June 1988.

The fortunate citizens in residence when the initiative passed may collect windfalls when they move away and sell the bargain leaseholds created by the Ordinance, as well as their mobilehome coaches. Other residents will pay (or, at still greater cost, finance) resale premiums that are likely to wipe out any saving. If, as Berger Foundation alleges, Escondido's Ordinance merely enriches a favored few, at the property owner's expense, it advances no legitimate purpose and violates the Takings Clause of the Fifth Amendment.

II.

TO DETERMINE WHETHER REGULATIONS SUBSTANTIALLY ADVANCE LEGITIMATE INTERESTS, COURTS MAY NOT SIMPLY ASSUME SOME RATIONAL BASIS, BUT MUST CONSIDER EVIDENCE.

Berger Foundation's claims are matters of fact, capable of proof, through evidence of market activity, records from operation of their property, and expert testimony from appraisers, economists and other experts. The Court of Appeal recognized as much, acknowledging that "[t]he inquiry as to when a regulation has gone too far is necessarily one of fact." (Appendix A-7).

The lower court nonetheless decided these facts based on conjecture, without evidence, by presuming benefits in much the same way that courts now reject substantive due process arguments if some rational basis may be assumed.

This reasoning is contrary to *Nollan,* which held the Takings Clause "to be more than a pleading requirement, and compliance with it [requires] more than an exercise in cleverness and imagination." 483 U.S. 841. *Nollan* distinguished takings claims — where regulations must "substantially advance" the "legitimate state purpose" — from lesser standards of scrutiny that apply to many due process and equal protection claims.

> We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved . . . not that "the State *'could rationally have decided'* that the measure adopted might achieve the State's objective."

483 U.S. 835 n. 3. Judicial conjecture about possible rational bases for disputed regulations cannot end the analysis. Erudite speculation is no substitute for evidence.

The lower court acknowledged that *Nollan* and *Lucas* "may require a reviewing court to subject such governmental action to higher than mere 'rational basis' scrutiny", but relied upon California precedent limiting *Nollan* and *Dolan* to "a relatively narrow class of land use cases". (Appendix A-13-14). For the rest, California courts attempt to identify some legitimate purpose, and then hypothesize possible benefits, without considering evidence of the regulation's actual effect.

In practice, this standard is indistinguishable from the "rational basis" test rejected by *Nollan* and *Dolan.* Since rent controls may be legitimate, and Berger Foundation did not contend that it had been denied a fair return, the court disposed of Berger Foundation's claim with an almost offhand observation that low rents presumably benefitted Berger Foundation's residents. (Appendix A-19).

Conjecture is no substitute for evidence that Escondido's Ordinance merely provides a windfall to those who were

residents when voters adopted rent control, at the owners' expense, while raising housing costs for future residents. Berger Foundation claims that Escondido's Ordinance operates perversely, to defeat its ostensible purposes, without advancing any substantial or legitimate interest.

Berger Foundation is entitled to an opportunity to prove its claims. The result below, and underlying California precedents, undermine *Nollan* and *Dolan* by permitting courts to assume or presume legitimacy, without looking past bare recitals or ostensible purposes to the real effects of stringent regulations that impose substantial costs upon a handful of property owners.

CONCLUSION

For these reasons, *amicus* respectfully requests that this Court grant Berger Foundation's petition for a writ of *certiorari* to review and overturn the decision below, which:

- Contravenes authoritative decisions of this Court,
- Denies property owners any opportunity to prove regulatory taking claims recognized by this Court.

Dated: March 23, 1999.

Respectfully submitted,

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